HAMDAN IBRAHIM

v.

LEMBAGA TATATERTIB HOSPITAL KUALA KANGSAR & ANOR

HIGH COURT MALAYA, TAIPING
VT SINGHAM JC
[ORIGINATING SUMMONS NO: 24-43-1998(T)]
11 NOVEMBER 2000
[2001] CLJ JT(1)

ADMINISTRATIVE LAW: *Public servants - Punishment - Punishment imposed without finding of guilt - Stoppage of increments - Whether disciplinary board acted with procedural impropriety and in excess of jurisdiction - Whether flaw in decision-making process curable - Whether plaintiff should be given opportunity to mitigate before imposition of punishment - Whether decision of disciplinary board and punishment meted out void and ultra vires - Whether adversarial system allows court to inquire into a breach which was not raised by the parties - Public Officers (Conduct and Discipline) Regulations 1993, regs. 14, 27, 28, 38 - Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980, O. 26(4)*

By a letter dated 8 April 1996, the 1st defendant (the disciplinary board of Hospital Kuala Kangsar) required the plaintiff to make written representations in respect of three charges that were framed against him. The plaintiff replied denying the allegations in the 1st and 2nd charges and gave an explanation on the 3rd charge. Thereafter, the 1st defendant replied stating that it had, at a meeting held on 23 May 1996, decided to impose the following punishment against the plaintiff: (i) on the 1st charge – deferment of salary movement for six months in accordance with reg. 38(d) of the Public Officers (Conduct and Discipline) Regulations 1993 ('the Regulations'); (ii) on the 2nd charge – deferment of salary movement for one year in accordance with reg. 38(d) of the Regulations; and (iii) on the 3rd charge – a warning in accordance with reg. 38(a) of the Regulations.

On 26 June 1996, the plaintiff sent his appeal to the 2nd defendant (the disciplinary appeal board of the Public Services Department). The plaintiff also informed the 2nd defendant that he was prepared to give evidence and explain if requested to do so. Thereafter, the 2nd defendant replied informing the plaintiff that it had, at a meeting held on 26 August 1996, decided that the submission by the plaintiff to support his appeal could not be entertained to change the decision of the 1st defendant, and that it had taken the decision to dismiss the plaintiff's appeal.

By an amended originating summons, the plaintiff sought, *inter alia*, the following declarations: (a) that the decision of the 1st defendant given on 23 May 1996 and the decision of the 2nd defendant given on 26 August 1996 were void and inoperative, wrong in law, and *ultra vires*; and (b) that the punishment imposed on the plaintiff was void and *ultra vires*.

Held:

[1] As reg. 38 of the Regulations contains five other types of punishment apart from reduction in rank or dismissal, it would be unjust to deny the plaintiff an opportunity to be heard in mitigation before punishment was imposed on him. The plaintiff ought to have been provided an opportunity to be heard in mitigation before the punishment was imposed on him.

[2] The decision-making process in respect of the punishment was flawed and this had resulted in procedural unfairness to the plaintiff. On this ground alone, the punishment could not stand.

[3] Regulation 27(2) of the Regulations expressly required the 1st defendant to make a finding on the guilt of the plaintiff as only upon finding the plaintiff guilty shall it proceed to impose against the plaintiff any one or more of the punishment provided in reg. 38 of the Regulations.

[4] As a finding of guilt against the plaintiff was nowhere stated either in the 1st defendant's letter of decision or in any of the affidavits affirmed on behalf of the defendants, there clearly was serious procedural unfairness or a breach of procedural fairness and excess of jurisdiction which warranted judicial intervention.

[5] Since a finding of guilt against the plaintiff was a prerequisite to punishment, which procedure was not followed by the 1st defendant, there was an incurable flaw in the exercise of the power of the 1st defendant to impose punishment against the plaintiff in respect of the first and second charges. Accordingly, the decision to impose punishment against the plaintiff could not be sustained and ought to be quashed.

[Plaintiff's claim allowed with costs.]

Case(s) referred to:

Amanah Butler (M) Sdn Bhd v. Yike Chee Wah [1997] 2 CLJ 79 ***(refd)***

B Surinder Singh Kanda v. The Government Of The Federation Of Malaya [1962] 28 MLJ 169 ***(foll)***

Delhi Transport Corp v. DTC Mazdor Congress & Ors [1991] Upp 1 SCC 600 ***(foll)***

Doody v. Secretary Of State For The Home Department & Other Appeals [1993] 3 All ER 92 ***(refd)***

Ekambaram Savarimuthu v. Ketua Polis Daerah Melaka Tengah & Ors [1997] 2 MLJ 454 ***(refd)***

Ganasan Marimuthu v. Public Services Commission & Anor [1998] 4 CLJ 331 ***(refd)***

Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara Malaysia & Anor [1994] 2 CLJ 333 ***(foll)***

Halimatussaadiah v. Public Service Commission, Malaysia & Anor [1992] 1 CLJ 413 ***(dist)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Another Appeal [1997] 1 CLJ 665 ***(refd)***

In re R Sambasivam [1969] 1 MLJ 219 ***(foll)***

Inspector-General Of Police & Anor v. Alan Noor Kamat [1988] 1 MLJ 260 ***(refd)***

Ketua Pengarah Kastam v. Ho Kwan Seng [1977] 2 MLJ 152 ***(refd)***

Krishnamoorthy Appannan v. Lembaga Tatatertib Perkhidmatan Awam, Pentadbiran Keretapi Tanah Melayu, Sentul, Kuala Lumpur [1999] 8 CLJ 314 ***(refd)***

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal [2000] 3 CLJ 224 ***(foll)***

Local Government Board v. Arlidge [1915] AC 120 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 ***(refd)***

Majlis Perbandaran Seberang Perai v. Tropiland Sdn Bhd [1996] 3 MLJ 94 ***(refd)***

Martha Stefan v. General Medical Council [1999] 1 WLR 1293 ***(refd)***

Mohd Najib Hj Ahmad v. Lembaga Padi Dan Beras Negara [1998] 4 CLJ 405 ***(refd)***

Munusamy v. Public Services Commission [1967] 1 MLJ 199 ***(refd)***

Ng Hock Cheng v. Pengarah Am Penjara & Ors [1998] 1 CLJ 405 ***(refd)***

R v. Gaming Board For Great Britain, ex p Benaim & Khaida [1970] 2 QB 417 ***(refd)***

R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 ***(refd)***

Raja Abdul Malek Muzaffar Shah Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 CLJ 619 ***(foll)***

Rohana Ariffin & Anor v. Universiti Sains Malaysia [1988] 1 CLJ 559 ***(dist)***

Samsuddin Mohd Saad v. Pengarah Hospital Bahagia, Ulu Kinta & Anor [1999] 1 CLJ 138 ***(not foll)***

Shamsiah Ahmad Sham v. Public Services Commission, Malaysia & Anor [1991] 1 CLJ 23 ***(dist)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 ***(refd)***

Tan Hee Lock v. Commissioner For Federal Capital & Ors [1973] 1 MLJ 238 ***(refd)***

Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 ***(refd)***

Utra Badi K Perumal v. Lembaga Tatatertib Perkhidmatan Awam & Anor [1998] 2 CLJ 306 ***(foll)***

Legislation referred to:

Evidence Act 1950, s. 114(g)

Federal Constitution, art. 135(2)(a)

Public Officers (Conduct And Discipline) Regulations 1993, regs. 27(1), (2), 28(1), 38

Public Officers (Conduct And Discipline) (Chapter D), General Orders 1980, O. 26(4), (5)

For the plaintiff - Gurbachan Singh; M/s Bachan & Kartar
For the defendants - Raja Rozila Raja Toran FC

JUDGMENT

VT Singham JC:

By an amended originating summons, the plaintiff claims against the defendants for a declaration that:

a) the decision of the disciplinary board (Lembaga Tatatertib) on 23 May 1996 which was communicated to the plaintiff through the letter dated 14 June 1996 and the decision of the disciplinary appeal board given on 26 August 1996 which rejected the plaintiff's appeal against the decision of the disciplinary board is void and inoperative, wrong in law, is of no effect and *ultra vires*;

b) the sentences passed against the plaintiff that is, the deferment of salary movement of the plaintiff is void and inoperative, wrong in law, is of no effect and *ultra vires*;

c) the deferment of salary movement of the plaintiff before or after the decision of the disciplinary appeal board is still continuing and there is no break at any time;

d) all such consequential orders which are just so as to give effect to the orders which are sought;

e) interest;

f) costs;

g) such further or other relief as this honourable court deems fit.

The amended originating summons is supported by an affidavit affirmed on 6 March 1998 by the plaintiff with copies of the relevant documents attached to the affidavit in support of his claim.

Background Of The Proceedings (Application By Defendants To Strike Out The Originating Summons Of The Plaintiff)

In the meantime, it is important to mention the background of the proceedings before the hearing of the originating summons commenced. By an application (summons-in-chambers dated 29 May 1998), the defendants through the Federal counsel applied to strike out the originating summons on the ground that it discloses no reasonable cause of action, frivolous and vexatious or it is an abuse of the process of the court. This application was opposed by the plaintiff and several affidavits were filed by both parties and finally, on hearing both parties, the application to strike out the originating summons was dismissed on 11 August 1999 by my predecessor, His Lordship Dato' Zulkefli bin Ahmad Makinudin J.

Application By Plaintiff To Amend The Originating Summons

Subsequently, the plaintiff filed an application by summons-in-chambers dated 1 June 2000 to amend the originating summons dated 11 March 1998 to read, the 1st defendant as Lembaga Tatatertib, Hospital Kuala Kangsar instead of Ketua Pengarah, Lembaga Tatatertib Hospital Kuala Kangsar and the 2nd defendant to read as Pengerusi Lembaga Rayuan Tatatertib Perkhidmatan Awam instead of Ketua Pengarah/Pengerusi Lembaga Rayuan Tatatertib Perkhidmatan Awam. This application was opposed by the defendants. Nevertheless, on hearing both parties, the application to amend was allowed on 24 August 2000 by His Lordship Dato' Zulkefli bin Ahmad Makinudin J. Accordingly, the originating summons was amended and the amended originating summons was finally fixed for hearing on 3 October 2000 before this court.

On 3 October 2000, the plaintiff was represented by counsel Mr. Gurbachan Singh and the defendants by Federal counsel YM Raja Rozila bt. Raja Toran.

Brief Facts Of This Case

The facts of this case are as follows:

By a letter dated 8 April 1996, the 1st defendant, Lembaga Tatatertib bagi Kumpulan Sokongan (No. 2) Hospital Kuala Kangsar required the plaintiff to make representation in writing in respect of three charges that were framed against him. The said letter which was marked as exh. HI 1 reads as follows:

LAMPIRAN D

LEMBAGA TATATERTIB,
HOSPITAL KUALA KANGSAR,
JALAN SULTAN IDRIS SHAH 1, TEL:7763333
33000 KUALA KANGSAR PERAK FAX:7769660
DARUL RIDZUAN.

'SULIT'

ENCIK HAMDAN B IBRAHIM, Ruj.kami: HKK/BP/S/09/01/06(13)
No. K/P 4235637,
Pembantu Tadbir N9 (Stor),
Unit Farmasi,
Hospital Kuala Kangsar.

Melalui,
Ketua Unit Farmasi, Tarikh: 8 April 1996
HKK.

Tuan,

TINDAKAN TATATERTIB BUKAN DENGAN TUJUAN BUANG KERJA
ATAU TURUN PANGKAT.

Bahawa satu laporan telah diterima oleh Lembaga Tatatertib yang menyatakan bahawa tuan, Encik Hamdan b. Ibrahim Pembantu Tadbir (Stor) Gred NO9 semasa bertugas di unit Farmasi Hospital Kuala Kangsar Perak telah berkelakuan yang melanggar tatakelakuan dan membolehkan tindakan tatatertib diambil terhadap tuan.

2. Lembaga Tatatertib setelah menimbangkan segala maklumat yang diterima, berpendapat bahawa tuan patut dikenakan tindakan tatatertib **bukan dengan tujuan buang kerja atau turun pangkat di bawah peraturan 27**, Peraturan-Peraturan Awam (Kelakuan dan Tatatertib) 1993 atas pertuduhan-pertuduhan berikut:

2.1 **Pertuduhan Pertama:**

Bahawa tuan, Encik Hamdan b. Ibrahim (No. K/P: 4235637), Pembantu Tadbir Stor Gred NO9, semasa bertugas di Stor Farmasi, Hospital Kuala Kangsar pada suatu tempoh dari Januari 1996 – awal Mac 1996 telah mengambil dan memiliki dengan salah DAFTAR SULIT Jabatan tentang Pemarkahan Nilaian Prestasi Tahunan 1995 bagi anggota-anggota Hospital Kuala Kangsar. Tuan telah membuat pengakuan memiliki dokumen sulit tersebut melalui perbuatan subahat dengan seseorang yang tuan rahsiakan, yang menyampaikan dengan salah kepada tuan satu sampul surat mengandungi daftar sulit pemarkahan prestasi tahunan 1995, yang diseludup masuk di bawah pintu bilik stor tempat tuan bertugas. Tuan dengan ini melanggar tatakelakuan di bawah Perintah Am 4(2) (f) dan (g) yang berbunyi seperti berikut:

4(2) – Seseorang Pegawai tidak boleh

(j) tidak jujur atau tidak amanah;

(g) tidak bertanggungjawab.

Jika tuan didapati bersalah ke atas pertuduhan pertama, **tuan boleh dihukum mengikut Peraturan 38**, Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993.

2.2 **Pertuduhan Kedua:**

Bahawa tuan, Encik Hamdan b. Ibrahim (No. K/P 4235637), Pembantu Tadbir Stor Gred NO9, semasa bertugas di Stor Farmasi, Hospital Kuala Kangsar telah **membocor Rahsia Jabatan** dengan menyebarkan/mengedar dengan salah kepada anggota-anggota Hospital Kuala Kangsar Daftar Sulit pemarkahan Nilaian Prestasi Tahunan 1995. Juga berkelakuan **menghasut** sehingga menimbulkan kekeruhan, kemarahan dan penyerangan fizikal dengan senjata rantai dan besi oleh En. Annuar b. Salleh – Pemandu terhadap Encik Abdul Latif b. Mohd Jan – Penolong Pegawai Tadbir Hospital Kuala Kangsar. Tuan dengan ini telah melanggar Peraturan 4(1), 4(2)(c), (d), (f), (g) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 yang berbunyi:

4(1) Seseorang pegawai hendaklah pada setiap masa dan pada setiap ketika memberikan taat setia yang tak berbelah bagi kepada Yang diPertuan Agung, Negara dan Kerajaan;

4(2) – Seseorang Pegawai tidak boleh:-

(c) berkelakuan dengan apa-apa cara yang mungkin menyebabkan syak yang munasabah bahawa membiarkan kepentingan persendirian bercanggah dengan tugas awam.

(d) berkelakuan dengan sedemikian cara hingga memburukkan nama atau mencemarkan nama perkhidmatan awam;

(f) tidak jujur atau tidak amanah;

(g) tidak bertanggungjawab.

Jika tuan didapati bersalah ke atas pertuduhan kedua, **tuan boleh dihukum mengikut Peraturan 38**, Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993.

2.3 **Pertuduhan ketiga:**

Bahawa tuan, Encik Hamdan b. Ibrahim (No. K/P 4235637), Pembantu Tadbir (Stor) Gred NO9, semasa bertugas di Stor Farmasi, Hospital Kuala Kangsar telah **tidak hadir bertugas** tanpa kebenaran pada:

i) 26.03.1996 dari pukul 8.00 pagi hingga 10.00 pagi dan

ii) 27.03.1996 pada pukul 8.00 pagi hingga 8.45 pagi.

Tuan dengan itu telah melanggar Peraturan 23(4) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 dan berkelakuan yang boleh diertikan sebagai tidak bertanggungjawab iaitu melanggar tatakelakuan di bawah Peraturan 4(2)(g) iaitu tidak bertanggungjawab.

Jika tuan didapati bersalah ke atas pertuduhan ketiga, **tuan boleh dihukum mengikut Peraturan 38,** Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993.

3. Mengikut Peraturan 27, Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 tuan adalah diminta **membuat satu representasi secara bertulis** yang mengandungi alasan-alasan yang tuan hendak gunakan untuk membebaskan diri tuan. Representasi tersebut hendaklah dikemukakan kepada **Pengerusi Lembaga Tatatertib Kumpulan Sokongan (No 2), Hospital Kuala Kangsar melalui Ketua Unit tuan dalam tempoh 21 hari dari tarikh tuan menerima surat ini.** Sekiranya tuan tidak membuat representasi tersebut dalam tempoh masa yang ditetapkan itu tuan akan dianggap sebagai tidak hendak membela diri dan perkara ini akan terus diputuskan oleh Lembaga Tatatertib bagi Kumpulan Sokongan (No. 2), Hospital Kuala Kangsar berdasarkan keterangan-keterangan yang sedia ada sahaja.

4. Sila tuan akui penerimaan surat ini dengan menandatangani surat akuan terima yang disertakan dan kembalikan.

'BERKHIDMAT UNTUK NEGARA'

(DR. SAMSIAH BT MOHD YUSOFF),
Pengerusi,
Lembaga Tatatertib bagi Kumpulan Sokongan (No. 2),
Hospital Kuala Kangsar.

/hamdan

By letter dated 24 April 1996, the plaintiff replied to the aforesaid letter dated 8 April 1996 from the 1st defendant, the Lembaga Tatatertib denying the allegations contained in the 1st and 2nd charges and gave an explanation to the 3rd charge. The plaintiff's reply which was marked as exh HI 2 reads as follows:

a HAMDAN BIN IBRAHIM,
PEMBANTU TADBIR (STOR),
HOSPITAL KUALA KANGSAR.

Pengerusi,
Lembaga Tatatertib bagi
b Kumpulan Sokongan (No. 2), **Tarikh:** 24 April 1996
Hospital Kuala Kangsar.

melalui:-

Pegawai Farmasi,
c Stor Integrasi,
Hospital Kuala Kangsar.

Tuan,

TINDAKAN TATATERTIB BUKAN DENGAN TUJUAN BUANG KERJA ATAU TURUN PANGKAT.
d

Adalah saya seperti nama diatas telah menerima surat dari pihak tuan HKK/ BP/S/09/01/06(13) bth. 8 April 1996 dan faham maksudnya.

2.1 **Pertuduhan Pertama**:-

e Saya tidak ada mengambil, memiliki atau menyimpan Daftar Sulit yang tuan maksudkan itu. Perkara ini telah saya terangkan kepada En. Abd. Latif b. Mohd. Jan pada 26 Mac 1996 dari jam 3.30 hingga 4.50 petang. En. Abd. Latif b. Mohd. Jan telah mendesak dan memaksa saya supaya mengaku menyimpan daftar tersebut. Oleh kerana beliau tidak berpuashati dengan keterangan yang saya berikan, keesokan harinya iaitu pada 27 Mac 1996,
f beliau telah datang ke Stor Integrasi untuk mencari daftar yang dikatakan sulit itu. Beliau telah menyelongkar (memeriksa) meja saya, meja En. Razaman b. Alias dan meja Puan Noor Arbaena bt. Shaharuddin.

2.2 **Pertuduhan Kedua**:-

g Bagaimana tuan boleh menuduh saya membocorkan Rahsia Jabatan kerana saya bukan bertugas di Pejabat Am dimana semua Rahsia Jabatan ada tersimpan. Jika ada Rahsia Jabatan yang terbocor sepatutnya Bahagian Pentadbiran yang mesti dipersalahkan. Saya juga tidak pernah menghasut En. Annuar b. Salleh supaya menumbuk En. Abd. Latif b. Mohd. Jan seperti yang tuan tuduh. Kemarahan En. Annuar b. Salleh berpunca dari sikap dan
h tutur kata En. Abd. Latif b. Mohd. Jan yang tidak menyenangkan.

2.2 **Pertuduhan Ketiga**:-

Pada 26 Mac 1996, saya telah datang bertugas pada pukul 8.00 pagi dan keluar semula pada pukul 8.20 hingga 8.40 pagi untuk menghantar anak
i ke Tadika Islam. Pada pukul 9.00 pagi, saya telah memberitahu Atendan Stor untuk keluar ke Bandar Kuala Kangsar kerana menanyakan Cerek

Letrik kepunyaan Wad A1 yang rosak di Kedai Leong & Sons. Selepas itu saya telah pergi ke Kedai Chin Seng untuk memesan Pewarna (Colouring) seperti yang diminta oleh Unit Farmasi. Kemudian saya pergi ke Maybank untuk mengambil gaji Bulan Mac 1996 dan terus minum teh. Saya balik ke Stor Integrasi pada pukul 10.00 pagi.

Pada 27 Mac 1996, saya telah pergi ke Kelinik Pergigian pada pukul 8.00 hingga 8.25 pagi kerana berjumpa dengan Bendahari Kelab Sukan. Dari pukul 8.25 hingga 8.45 pagi, saya telah menghantar anak saya ke Tadika Islam Kuala Kangsar.

Sekian penjelasan dari saya, terima kasih.

BERKHIDMAT UNTUK NEGARA

Saya yang menurut perintah,

(HAMDAN BIN IBRAHIM)
Pembantu Tadbir (Stor),
Hospital Kuala Kangsar.

ALMJ/hi.

Pursuant to the three charges framed in the said letter dated 8 April 1996 and the said reply dated 24 April 1996 from the plaintiff, the 1st defendant, the disciplinary board replied by a letter dated 14 June 1996 stating *inter alia*, that on considering the charges against the plaintiff and his reply, the 1st defendant, the disciplinary board on a meeting held on 23 May 1996 decided to impose the sentences against the plaintiff which were as follows, namely:

a) on the **1st charge** to defer salary movement for six months in accordance with reg. 38(d);

b) on the **2nd charge** to defer salary movement for one year in accordance with reg. 38(d). The sentences for the 1st and 2nd charges were ordered to run concurrently;

c) on the **3rd charge,** a warning was given in accordance with reg. 38(a);

d) the plaintiff was also given the opportunity to appeal against the decision of the 1st defendant, the disciplinary board to the disciplinary appeal board within 14 days from the date of receipt of the decision of the 1st defendant, the disciplinary board in accordance with reg. 14.

The contents of the said reply dated 14 June 1996 which was marked as exh. SY3 and attached to the affidavit in reply dated 7 October 1998 of the 1st defendant, the disciplinary board reads as follows:

a

HOSPITAL KUALA KANGSAR,
JALAN SULTAN IDRIS SHAH 1,
33000 KUALA KANGSAR PERAK DARUL RIDZUAN

TEL:7763333
FAX: 7769660

'SULIT'

Ruj kami: HKK/BP/S/09/01/06(16)

b

ENCIK HAMDAN B IBRAHIM,
No. K/P 4235637,
Pembantu Tadbir N9 (Stor),
Unit Farmasi,
Hospital Kuala Kangsar.

Tarikh: 14 Jun 1996

c

Melalui,
Ketua Unit Farmasi,
HKK.

Tuan,

d

KEPUTUSAN TATATERTIB LEMBAGA TATATERTIB KUMPULAN SOKONGAN (NO. 2), HOSPITAL KUALA KANGSAR

Saya diarah merujuk kepada surat Lembaga Tatatertib ini bil. (13) dlm. HKK/BP/S/09/01/06 bertarikh 8 April 1996 yang meminta tuan mengemukakan representasi secara bertulis mengandungi alasan-alasan yang tuan hendak

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gunakan untuk bebaskan diri. Lembaga Tatatertib Kumpulan Sokongan (No. 2), Hospital Kuala Kangsar dalam mesyuarat yang ke 2/1996 pada 23 Mei 1996 **setelah menimbangkan dengan teliti pertuduhan ke atas tuan dan jawapan yang diberi oleh tuan, telah memutuskan bahawa tuan dikenakan hukuman berikut**:-

f

HUKUMAN

Pertuduhan Pertama – 'Tangguh pergerakan gaji' selama 6 bulan, mengikut Peraturan 38(d)

Pertuduhan Kedua – 'Tangguh pergerakan gaji' selama 1 tahun, mengikut

g

Peraturan 38(d)

Pertuduhan Ketiga – 'Amaran', mengikut Peraturan 38(a)

Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993, (P.U.(A) 395/93). Hukuman bagi pertuduhan pertama dan kedua akan dijalankan

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serentak.

2. Mengikut Peraturan 14, Peraturan-peraturan Lembaga Tatatertib Perkhidmatan Awam 1993, (P.U.(A) 396/93), tuan adalah dengan ini diberi peluang untuk membuat rayuan kepada Lembaga Rayuan Tatatertib melalui Ketua Jabatan tuan di dalam tempoh 14 hari dari tarikh penerimaan surat

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keputusan Lembaga Tatatertib ini.

3. Sila tuan akui penerimaan surat ini dengan menandatangani surat akuan terima yang disertakan dan kembalikan.

'BERKHIDMAT UNTUK NEGARA'

(DR. SAMSIAH BT MOHD YUSOFF),
Pengerusi,
Lembaga Tatatertib bagi Kumpulan Sokongan (No.2),
Hospital Kuala Kangsar.

/hamdan

The plaintiff then by letter dated 26 June 1996 and marked as exh. HI 3 sent his appeal to the disciplinary appeal board and once again denied the 1st and 2nd charges and appealed to the disciplinary appeal board to reconsider the sentences imposed against him. The plaintiff also informed the disciplinary appeal board that he was prepared to give evidence and explain to the disciplinary appeal board if he was requested to do so. The contents of the plaintiff's said letter of appeal dated 26 June 1996 and marked as exh. HI 3 reads as follows:

HAMDAN BIN IBRAHIM,
PEMBANTU TADBIR N9,
STOR INTEGRASI,
HOSPITAL KUALA KANGSAR.

Pengerusi,
Lembaga Rayuan Tatatertib,
Suruhanjaya Perkhidmatan Awam Malaysia,
Bahagian Perkhidmatan,
Tingkat 16 & 17, Wisma KWSG,
Jalan Kampung Attap,
50520 Kuala Lumpur. **Tarikh:** 26 Jun 1996

melalui:-

Pengarah,
Hospital Kuala Kangsar,
33000 Kuala Kangsar.

Tuan,

RAYUAN KEPADA KEPUTUSAN TATATERTIB LEMBAGA TATATERTIB KUMPULAN SOKONGAN (NO. 2), HOSPITAL KUALA KANGSAR.

Dengan segala hormatnya dimaklumkan bahawa saya seperti nama diatas telah menerima surat Bil(16)dlm.HKK/BP/S/09/01/06 bth. 14 Jun 1996 mengenai hukuman yang dikenakan kepada diri saya.

2. Disini saya merayu kepada pihak tuan supaya hukuman terhadap pertuduhan pertama dan kedua yang dikenakan kepada diri saya ini dapat dimansuhkan atas sebab-sebab berikut:-

i) Saya tidak ada menyimpan Senarai Pemarkahan Nilaian Prestasi Tahunan 1995 bagi anggota-anggota Hospital Kuala Kangsar dari Bulan Januari hingga Mac 1996. Saya telah diberitahu oleh En. Annuar b. Salleh bahawa beliau menjumpai senarai tersebut didalam bakul sampah berhampiran dengan Unit Kecemasan.

ii) Saya tidak pernah menghasut En. Annuar b. Salleh supaya menumbuk En. Abd. Latif b. Mohd. Jan kerana saya tidak ada menyimpan perasaan sakithati, marah atau dendam kepada En. Abd. Latif kerana beliau bukan Pegawai Penilai yang membuat lapuran prestasi tahunan saya. Saya juga telah dididik dan diasuh oleh ibubapa saya dari kecil lagi supaya menghormati dan berbudibahasa dengan orang lain. Oleh kerana didikan inilah, saya telah diberi kepercayaan untuk menjadi Pengerusi Koperasi yang mempunyai anggota seramai 2,300 orang sejak 7 tahun yang lalu.

iii) Gaji SSB saya telah mencapai had maksima pada Bulan April 1992 dan ini bermakna telah 4 tahun gaji saya statik. Dengan pelaksanaan skim gaji yang baru ini, saya akan menerima tangga gaji maksima pada Bulan Januari 1997. Jika hukuman yang dikenakan terhadap diri saya ini berkuatkuasa, maka saya terpaksa menunggu sehingga Bulan Januari 1998 barulah gaji saya bergerak. Ini bermakna saya telah kehilangan RM 44.00 sebulan untuk tempuh 12 bulan.

iv) Dalam masaalah ini, saya telah dianayai dan difitnah supaya menerima hukuman dari perbuatan orang lain. Perkara ini telah saya nyatakan kepada Pengarah Hospital Kuala Kangsar semasa saya berjumpa dan merayu dengan beliau pada 19 Jun 1996 yang lalu.

3. Dengan alasan-alasan yang diberikan ini, saya memohon dan merayu supaya hukuman-hukuman yang dikenakan kepada diri saya ini dapat dipertimbangkan semula. Saya bersedia untuk memberi keterangan dan penjelasan kepada Lembaga Rayuan Tatatertib jika dikehendaki saya berbuat demikian.

4. Segala pertimbangan dan budibaik tuan itu sangat-sangat saya harapkan dan mendahului dengan ucapan ribuan terima kasih. Disini saya menyusun jari sepuluh memohon ampun dan maaf sekiranya perkara ini telah menyusahkan pihak tuan dan Lembaga Rayuan Tatatertib.

Sekian.

BERKHIDMAT UNTUK NEGARA

Saya yang menurut perintah,

(HAMDAN BIN IBRAHIM)
Pembantu Tadbir N9,
Stor Integrasi,
Hospital Kuala Kangsar.

/hi

By letter dated 12 September 1996, the 2nd defendant, the disciplinary appeal board replied to the plaintiff's letter of appeal dated 26 June 1996 that the 2nd defendant, the disciplinary appeal board on considering in detail the plaintiff's appeal at a meeting held on 26 August 1996 had decided that the submission forwarded by the plaintiff to support his appeal could not be received to change the decision of the 1st defendant, the disciplinary board. Accordingly, the 2nd defendant, the disciplinary appeal board had taken a decision to dismiss the plaintiff's appeal. The plaintiff was also informed that the decision of the disciplinary appeal board is final. The contents of the said letter dated 12 September 1996 and marked as exh. HI 4 reads as follows:

SURUHANJAYA PERKHIDMATAN AWAM,
MALAYSIA
TINGKAT 16-19, WISMA KWSG,
JALAN KAMPUNG ATTAP,
50520 KUALA LUMPUR.

Telefon: 03-2745000
Fax: 03-2731051
Kawat: "SERCOMS KUALA LUMPUR"

Ruj. Tuan:
Ruj. Kami: SPA.SULIT.T/194/1750/(5)
Tarikh: 12 September 1996

Encik Hamdan bin Ibrahim

Melalui
dan
Salinan:

Ketua Setiausaha,
Kementerian Kesihatan Malaysia,
Bahagian Sumber Manusia,
Jalan Cenderasari,
50590 Kuala Lumpur.

Tuan,

Keputusan Lembaga Rayuan Tatatertib Perkhidmatan Awam

Saya diarah menarik perhatian kepada surat rayuan tuan terhadap keputusan Lembaga Tatatertib Kumpulan Sokongan (No. 2) Hospital Kuala Kangsar yang telah mengenakan hukuman **'tangguh pergerakan gaji selama satu (1) tahun dan amaran** ke atas tuan.

2. Lembaga Rayuan Tatatertib Perkhidmatan Awam dalam mesyuaratnya yang ke-745 pada 26.8.1996 setelah menimbangkan dengan teliti rayuan tuan itu, telah memutuskan bahawa hujah-hujah yang dikemukakan bagi menyokong rayuan tuan itu tidak dapat diterima sebagai boleh mengubah keputusan Lembaga Tatatertib yang telah menjatuhkan hukuman **'tangguh pergerakan gaji selama satu (1) tahun dan amaran'** ke atas tuan. Dengan hal yang demikian, Lembaga Rayuan mengambil keputusan menolak rayuan tuan.

3. Keputusan Lembaga Rayuan Tatatertib ini adalah muktamad.

'BERKHIDMAT UNTUK NEGARA'

Saya yang menurut perintah,

(RUKIAH BT. SHAM)
b.p. Pengerusi,
Lembaga Rayuan Tatatertib Perkhidmatan Awam,
Suruhanjaya Perkhidmatan Awam,
Malaysia.

Hearing Of The Originating Summons

At the outset of the hearing of the amended originating summons on 3 October 2000, both the plaintiff's counsel and the Federal counsel for the defendants informed this court that both parties had agreed and were relying on the following affidavits for the purpose of this hearing which are as follows:

(a) Affidavit of the plaintiff affirmed on 6 March 1998.

(b) Affidavit in reply of Dr. Shamsiah bte Mohd Yusoff affirmed on 7 October 1998 on behalf of the 1st defendant, the disciplinary board.

(c) Affidavit in reply of the plaintiff affirmed on 4 January 1999.

(d) Affidavit in reply of Dr. Shamsiah bte Mohd Yusoff affirmed on 13 February 1999 on behalf of the 1st defendant, the disciplinary board.

(e) Affidavit of Dato' Haji Ibrahim bin Haji Mohd Shariff affirmed on 30 September 2000 on behalf of the 2nd defendant, the disciplinary appeal board.

Submission Of Plaintiff's Counsel

The **plaintiff's counsel, Mr. Gurbachan Singh** *inter alia*, submitted as follows:

(1) ***On The 1st Charge***

a) the plaintiff is a store keeper at the Hospital Kuala Kangsar.

Departmental Report

b) exhibit HI 1 being the letter dated 8 April 1996 from the 1st defendant was a proposed disciplinary action in respect of three charges. He referred to the 1st and 2nd paragraphs of the said letter particularly the words **"Bahawa satu laporan telah diterima oleh Lembaga Tatatertib ..."** in para 1 and to the words "Lembaga Tatatertib setelah menimbangkan segala maklumat yang diterima ..." in para 2.

c) the lapuran or the maklumat has not been provided to the plaintiff todate, and it has not been identified who had made the report or the source of the information leaving alone the nature of the information or the report and that the disciplinary board proposed to take disciplinary action merely based on the information or report against the plaintiff. The said letter exh. HI 1 only contains the three charges and that was not sufficient.

d) the plaintiff had credibly denied the allegation by the representation he made to the 1st defendant in that the plaintiff has specifically denied the 1st and 2nd charges.

e) there is doubt in the decision of the disciplinary board as there is no denial by En. Abdul Latif that he had searched the drawers the next day and since this has not been denied, this non denial is deemed admission.

(2) ***On The 2nd Charge***

a) there was a specific denial by the plaintiff and there is no denial by En. Annuar b. Salleh that the plaintiff did not instigate him to assault En. Abd. Latif and En. Annuar could have confirmed if there was such an instigation.

(3) the report must be departmental report and the defendants have denied that there was any investigation. The defendants should have afforded to the plaintiff a reasonable opportunity of hearing by providing him with the report and the information contained in exh HI 1.

(4) If the report and information was not supplied to the plaintiff it amounts to denial or deprivation and that the *audi ultra partem* rule must apply.

(5) the disciplinary board has taken into account material extraneous matters and *ex parte* into consideration.

(6) the notes of proceedings ought to have been exhibited to show what was before the disciplinary board or what was not before it. Since the available evidence was not produced, s. 114(g) of the Evidence Act 1950 **could be invoked**.

(7) failure to provide the report and information amounts to procedural unfairness.

(8) charge is not the complaint but the allegations based on the complaint and the report and information must be provided to the plaintiff although it was not asked for by the plaintiff.

(9) by not providing the report and information, the 1st defendant has exceeded jurisdiction which cannot be done away as the principle involved is more important.

(10) ***On The 3rd Charge***

a) the plaintiff's counsel informed the court that he was not proceeding further in respect of the 3rd charge but was proceeding only in respect of the matters complained of in reference to the 1st and 2nd charges.

Oral Hearing

(11) no oral hearing was held and therefore there was no proper investigation of the complaint which provided the report to the disciplinary board in the trial process. On the facts and circumstances of this case, oral hearing ought to have been provided to the plaintiff.

Reasons for rejecting plaintiff's representation

(12) there were no reasons given by the 1st defendant, the disciplinary board for rejecting the plaintiff's representation or explanation given in exh. HI 2. There were no reasons given at all despite specific denial by the plaintiff to the 1st and 2nd charges.

Right of mitigation before imposing sentence

(13) the exh. HI 1 did not disclose the intended punishment and that the plaintiff was not provided the right of mitigation after he was found guilty of the charges.

(14) even on the assumption that the 1st defendant, the disciplinary board was right in finding the plaintiff guilty on the three charges, the decision is flaw for failure to give the plaintiff an opportunity to make representation and mitigation. Second opportunity ought to be given to the plaintiff before imposing the punishment and this was a procedural irregularity.

(15) plaintiff was a government servant and has an unblemished record.

(16) in support of his arguments, learned counsel for the plaintiff referred to the following cases:

a) *B Surinder Singh Kanda v. The Government Of The Federation Of Malaya* [1962] 28 MLJ 169

b) *Rohana bte Ariffin & Anor v. Universiti Sains Malaysia* [1988] 1 CLJ 559

c) *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Another Appeal* [1997] 1 CLJ 665

d) *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748

e) *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & 2 Ors* [1995] 1 CLJ 619

f) *Inspector-General Of Police & Anor v. Alan Noor bin Kamat* [1988] 1 MLJ 260

g) *Utra Badi a/l K Perumal v. Lembaga Tatatertib Perkhidmatan Awam & Anor* [1998] 2 CLJ 306

h) *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771

(17) he finally submitted that the plaintiff's claim be allowed. He also submitted that in the event, the plaintiff's claim is disallowed, the plaintiff should not be burdened with costs.

Submission Of The Federal Counsel

On the other hand, the Federal counsel, YM Raja Rozila bt. Raja Toran for the defendants submitted as follows.

At the outset of her submission, the learned Federal counsel brought to the attention of this court and submitted that although the decision in *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 CLJ

771 was not taken up further to the Federal Court but the majority decision which was relied on by the plaintiff's counsel in *Tan Tek Seng* has been overruled by the Federal Court in *Ng Hock Cheng v. Pengarah Am Penjara & Ors* [1998] 1 CLJ 405 and that the majority decision in *Tan Tek Seng* should not be relied on by this court.

Whether Court Has To Look At The Facts Of The Plaintiff's Case

This court does not have to look at the facts as this court was not sitting as an appellate court and it was only exercising supervisory jurisdiction on the decision making process of the disciplinary board as to whether all procedures had been followed in arriving at their decision.

Disciplinary Board To Follow reg. 27 Of Regulations 1993

The 1st defendant was only obliged to follow the provision in **reg. 27 of the Public Officers (Conduct And Discipline) Regulations 1993 hereinafter referred to as "Regulations 1993"** and this provisions have been complied with by the 1st defendant, the disciplinary board.

Exhibit HI 1 is a show cause letter and that was in compliance with the 1st limb of reg. 27(1) which has informed the plaintiff of the alleged breach of discipline. It has also provided an opportunity to the plaintiff to know what the charges are against him and which provided an opportunity to the plaintiff to reply to those charges.

All the charges framed against the plaintiff are specific, in detail and plain. The charges allowed the plaintiff to make specific reply and the plaintiff has given a complete and specific reply to defend himself.

By complying with reg. 27, the 1st defendant – the disciplinary board has complied with the decision making process.

The contents in paras 1 and 2 of exh. HI 1 is actually informing the plaintiff that the 1st defendant, the disciplinary board was initiating to take disciplinary action against him.

The Federal counsel frankly admitted that she herself is not aware of the contents of the report and the information as mentioned in the letter dated 8 April 1996 and marked as exh. 'HI 1' but however she argued that it could be assumed that the report and information referred to in exh. HI 1 is what is recorded in the charges. However, the Federal counsel submitted that the report need not be supplied to the plaintiff as the disciplinary proceedings was initiated based on that report and that the particulars of the charge contained in the said letter dated 8 April 1996 exh. HI 1 was sufficient for the plaintiff to know what the charges were against him and to enable him to reply which the plaintiff did.

Whether Disciplinary Board Obliged To Conduct Investigation

The disciplinary board is not required to conduct an investigation because that will amount to conducting a full trial in a normal court room and that disciplinary proceeding is not the normal civil and criminal trial.

Oral Hearing

There was no requirement on the part of the disciplinary board to conduct an oral hearing for the plaintiff.

On the facts and circumstances in this case, there was no justification to provide an oral hearing to the plaintiff as there was no provision in reg. 27 and that the plaintiff has given complete and sufficient reply to defend himself. She submitted that the law on the issue to provide oral hearing has been laid to rest.

Regulation 27 Of Regulations 1993

The Federal counsel read out **reg. 27 of the Regulations 1993** which reads as follows:

> **regulation 27. Procedure in disciplinary cases not with a view to dismissal or reduction in rank.**
>
> (1) Where the Chairman of the appropriate Disciplinary Authority finds that the breach of discipline complained of is of a nature which merits a punishment lesser than dismissal or reduction in rank, the appropriate Disciplinary Authority shall inform the officer in writing of the facts of the breach of discipline alleged against him and shall give to the officer an opportunity of making a representation in writing within a period of not less than twenty-one days from the date of receipt of the facts.
>
> (2) **Where, after considering the representation made under subregulation (1), the appropriate Disciplinary Authority finds ...**
>
> (a) **the officer guilty, it shall impose on the officer any one or more of the punishments specified in regulation 38** as it deems fit and proper; or
>
> (b) The officer not guilty, it shall acquit him.

She also submitted that there was no requirement for the decision making body, in this case the 1st defendant to disclose the report or to provide an oral hearing. She submitted that the plaintiff has been given the opportunity to defend himself and to make representation and that the charges were specific, comprehensible and detailed and that there need not be an investigation or an oral hearing.

Issue Of Punishment And Mitigation

She referred to *Utra Badi* and submitted that the decision was not binding on this court as it was the decision of a High Court and that this court was entitled to disregard the decision.

She instead referred to *Samsuddin Mohd Saad v. Pengarah Hospital Bahagia, Ulu Kinta & Anor* [1999] 1 CLJ 138 wherein the decision in *Utra Badi* was not followed. In view of the decision in *Samsuddin*'s case, the right to provide a second opportunity to mitigate does not arise in disciplinary proceedings.

The plaintiff's claim against both the defendants should be dismissed with costs.

She referred to the following cases:

a) *Ng Hock Cheng v. Pengarah Am Penjara & Ors* [1998] 1 CLJ 405

b) *Utra Badi a/l K Perumal v. Lembaga Tatatertib Perkhidmatan Awam & Anor* [1998] 2 CLJ 306

c) *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & 2 Ors* [1995] 1 CLJ 619

d) *Ghazi bin Mohd Sawi v. Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 CLJ 333

e) *Samsuddin Mohd Saad v. Pengarah Hospital Bahagia, Ulu Kinta & Anor* [1999] 1 CLJ 138

Reply By The Plaintiff's Counsel

This court must consider the facts out of necessity and then apply the law and that this court has jurisdiction to review the facts although Regulations 1993 does not provide for the same.

In order to adjudicate this court must look at the facts if there is procedural unfairness.

The report and the maklumat was hidden or concealed from the plaintiff and that there must be reasonable compliance with reg. 27 and not a pretended compliance.

In exh. HI 1, the first paragraph shows that the 1st defendant, the disciplinary board had already made up its mind to take disciplinary action against the plaintiff.

Samsuddin's case is under appeal and the facts are different and this court should not follow that decision.

The plaintiff's claim should be allowed.

Federal Counsel Sought Permission Of Court To Reply

The learned Federal counsel sought the permission of this court to submit on the reply of the plaintiff's counsel. In granting the permission, this court limited her reply to answer only in respect of the particular issue that she intended to reply and not to repeat her previous submissions.

The Federal counsel referred to para 2 of exh HI 1 and has submitted that it mainly states **"... patut dikenakan tindakan tatatertib ..."** and submitted that it does not mean that the plaintiff was found guilty.

She submitted that to defer salary increment is not a serious punishment and referred to *Munusamy v. Public Services Commission* [1967] 1 MLJ 199.

DECISION OF THIS COURT

Whether Plaintiff Is Entitled To The Report On Which The Charges Were Framed

As to the complaint that the plaintiff was not supplied with the report and the information which the 1st defendant had in his possession at the time when the disciplinary proceedings were initiated as mentioned in exh. HI 1, this court is of the view that there is no such obligation under reg. 27 on the part of the disciplinary board to supply the plaintiff with that report. Basically, the issues are whether the lapuran which was received by the disciplinary board as stated in the first letter exh. HI 1 must be disclosed to the plaintiff and what is the consequences of it not having been disclosed to the plaintiff. Can it be said that the disciplinary board took into account extraneous materials when deciding to impose the punishment against the plaintiff. This court is of the view that the lapuran which was received by the disciplinary board and which moved the disciplinary board to initiate disciplinary proceedings against the plaintiff need not be disclosed to the plaintiff because unlike the old General Order 26(5) of the Public Officers (Conduct And Discipline) Chapter D General Orders 1980, there is no requirement under reg. 27(1) of Regulations 1993 for a committee of inquiry to be appointed on the facts in the plaintiff's case. It is only in cases or situations when such committee of investigation is appointed at the discretion of the disciplinary board that the production of the report could be requested. It is also important to state here that the appointment

of a committee of investigation only applies to cases under reg. 28(1) of Regulations 1993 when the breach of discipline merits a punishment of dismissal or reduction in rank which has no application to the plaintiff's case as the procedure applied was under reg. 27(1) of Regulations 1993. Nowhere it is stated in reg. 27 that the source of the complaint is required to be disclosed to the plaintiff. Also, it is important to note that the reply exh. SY3 from the disciplinary board to the plaintiff's representation did not make any reference to the report. Therefore it cannot be said or even implied that the disciplinary board in addition to the charges and the plaintiff's representation took into account extraneous materials. As a matter of fact, the report appears to have formed the fulcrum of the charges against the plaintiff and the preamble to reg. 27(1) expressly permits the disciplinary board to make a finding as to the breach of the discipline complained of.

This court is of the view that there is a great distinction between the facts in *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & 2 Ors* [1995] 1 CLJ 619 and the facts in the case before this court and that the decision in *Raja Abdul Malek* cannot apply to the facts in this case. In *Raja Abdul Malek*, the police service commission in deciding to dismiss the plaintiff took into account by *ex parte* other relevant information without making it available to the plaintiff to comment on it and that was clearly a breach of his constitutional rights and obviously went against the *audi ultra partem* rule. Also, the learned judge of the High Court in that case did not address his mind to that aspect of the complaint despite a submission made by the plaintiff's counsel. The Court of Appeal therefore ruled that there was a serious misdirection which had occasioned a miscarriage of justice. Whereas in the plaintiff's case before this court, the reply of the disciplinary board has expressly stated that the disciplinary board had only considered the charges that were framed against the plaintiff and the representation or reply given by the plaintiff. In the circumstances, this court is of the view that there was no breach of the rules of natural justice on this particular complaint when the disciplinary board decided to impose the punishment as provided under reg. 38 of Regulations 1993. This court finds that the disciplinary board had not contravened the rule of natural justice and did not take into account any extraneous materials into consideration in arriving at its decision. The plaintiff replied to the charges without seeking any further clarification which means he understood the charges and had put forward his case. The plaintiff was given a reply by the disciplinary board and when the punishment was imposed on him, he took his case further and appealed to the disciplinary appeal board. The disciplinary appeal board considered his appeal and gave a decision by rejecting his appeal. In *Shamsiah bte Ahmad Sham v. Public Services Commission, Malaysia & Anor* [1991] 1 CLJ 23,

the situation was also different in that, the public services commission in deciding to dismiss the respondent took into account the appellant's record of past conduct without giving her an opportunity to explain or comment on the allegations and therefore the Supreme Court held that those damaging materials were detrimental to the appellant's case and allowed her appeal. The Supreme Court in allowing the appeal in favour of the plaintiff said through Jemuri Serjan SCJ as His Lordship then was:

> In our view, para (2) of the show cause letter by itself constituted an intrinsic evidence that the first respondent, though acting perfectly in good faith, had taken these damaging materials into account in deciding to dismiss her, using her previous disciplinary actions and punishments as aggravated circumstances. Armed with the record of all the various disciplinary actions and punishments against her it would seem inevitable and indeed logical under the circumstances for the first respondent to have decisively reached at the determination to dismiss her. It was as if her casual attitude towards her previous disciplinary punishments demonstrated her as an obstinate, incorrigible and delinquent civil servant and under these circumstances, therefore, we could not see what other decisions the first respondent could otherwise possibly make. The adverse record had sealed her fate as a civil servant. It seemed to us that the grounds for the disciplinary action before the first respondent by themselves were not serious enough to merit a dismissal without taking into account those damaging materials concerning the conduct of the appellant.
>
> With all respect, the learned judge below should not have held that the first respondent was perfectly entitled to take into consideration the appellant's previous conduct without saying further that she must also be provided with an opportunity to explain or contradict them. The record of service as far as the disciplinary action before the first respondent was concerned contained extraneous matters, detrimental to the appellant's case. Even before the case of *Ridge v. Baldwin*, Lord Denman CJ in *R v. Smith* in dealing with the case of dismissal of a parish clerk held than even personal knowledge of the offence was no substitute for hearing the officer: his explanation might disprove criminal motive or intent and bring forward other facts in mitigation. We are not saying and should not be quoted as saying that the past record of the appellant should not be taken into account in considering her guilt or the appropriate punishment if she were found guilty of the charge. What we are saying is that if these materials which have such damning effect on her case are to be used against her she should be given a right to be heard on them. It is not a matter of pure technicality but it is absolutely fundamental in law that the appellant should have been given an opportunity of stating her case regarding her past conducts, considering that the dismissal of a civil servant is no light matter.

In *Rohana bte Ariffin & Anor v. Universiti Sains Malaysia* [1988] 1 CLJ 559, the facts were entirely different and that there was a committee of inquiry appointed by the disciplinary authority under General Order 26(5) of the General Orders 1980 and it involved an application for pre trial discovery. His Lordship Edgar Joseph Jr. J as His Lordship then was said:

> It is a well-established principle of administrative law that anything that restricts, or appears to restrict, the defendant's ability to present his case may be held to be a breach of procedural fairness and, thereby, susceptible to judicial review; for example, a defendant is generally entitled to notice of evidence that might assist his case. It is, therefore, a breach of natural justice for the prosecution to conceal such evidence.

In *Ekambaram a/l Savarimuthu v. Ketua Polis Daerah Melaka Tengah & Ors* [1997] 2 MLJ 454, the disciplinary board took into account the previous records of the applicant before he was afforded an opportunity to explain or reply to those records when the disciplinary board decided to impose the punishment of dismissal. His Lordship Suriyadi J in allowing the application for *certiorari* and quashing the order of dismissal held that there was procedural defect which was an infringement of the rights of the applicant and the rule of natural justice.

In *Mohd Najib bin Hj Ahmad v. Lembaga Padi Dan Beras Negara* [1998] 4 CLJ 405, the disciplinary committee in dismissing the appellant took into account matters of which the appellant had no notice of and for which he had no opportunity to reply. Also at the civil trial, the respondent did not explain what was the other relevant information which was considered by the disciplinary committee and the respondent opted to remain silent. In allowing the appeal against the dismissal of the appellant's suit by the High Court, Her Ladyship Dato' Siti Norma Yaakob JCA in delivering the judgment of the Court of Appeal held that the extraneous material must have played a part in influencing the disciplinary committee in arriving at the decision when it meted out the punishment against the appellant.

In *Krishnamoorthy a/l Appannan v. Lembaga Tatatertib Perkhidmatan Awam, Pentadbiran Keretapi Tanah Melayu, Sentul, Kuala Lumpur* [1999] 8 CLJ 314, the plaintiff, a Tukang K2 Tingkatan Kanan attached to the Malayan Railway Administration was arrested by the police on suspicion of a theft of railway property and a committee was set up to investigate into the alleged offence of theft and the upshot of the investigation was that a report with recommendation was submitted to the disciplinary board. At the meeting as admitted by the secretary to the disciplinary board it deliberated on the said report together with the plaintiff's representations in response to the show cause letter to the plaintiff with a view to dismissal or reduction in rank. Therefore His Lordship Mohd Saari J as His Lordship

then was now judge of the Court of Appeal held that the plaintiff ought to have been supplied and be given the opportunity to explain or controvert what had been taken into account by the disciplinary board in arriving at the finding of guilt against the plaintiff and held the dismissal to be null and void.

Whereas in the plaintiff's case before this court the plaintiff was adequately informed of the case framed against him and he was given an opportunity to answer those charges and he responded by making his representation and the disciplinary board after considering the charges and the representation made by the plaintiff decided to impose the punishment. Infact exh. SY3 is self-explanatory to show that the disciplinary board did not take into account the said report. Accordingly, the argument on this ground fails. In the circumstances, the complaint that the plaintiff ought to have been supplied with the report by the disciplinary board and therefore there was a breach of the rules of natural justice is rejected.

Whether Plaintiff Is Entitled To An Oral Hearing

It is the view of this court that there is no mandatory requirement or any express provision in reg. 27 of Regulations 1993 for the 1st defendant, the disciplinary board to provide the plaintiff with an oral hearing. In *Ghazi bin Mohd Sawi v. Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 CLJ 333, His Lordship Jemuri Serjan CJ (Borneo) in delivering the judgment of the Supreme Court said:

> The right to be heard does not mean the right to be heard orally. What it means is that the officer concerned should be given a full opportunity of stating his case.

In *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & 2 Ors* [1995] 1 CLJ 619 at p. 625, His Lordship Gopal Sri Ram JCA in delivering the judgment of the Court of Appeal said:

> The proposition that the right to be heard does not in all cases include the duty to afford an oral hearing is well settled by binding precedent. (See *Najar Singh v. Government of Malaysia* [1976] 1 MLJ 203; *Ghazi bin Mohd Sawi v. Mohd. Haniff bin Omar* [1994] 2 MLJ 114). That there can be no breach of a duty where none exists is axiomatic.
>
> Nevertheless, the principle that the right to be heard is non-inclusive of a duty to afford an oral hearing does not mean that the failure or refusal to afford such a hearing would render the decision reached safe and harmless from attack. Cases may arise where, in the light of peculiar facts, the failure to afford an oral hearing may result in the decision arrived at being declared a nullity or quashed. (See *R. v. Immigration Appeal Tribunal* [1977] 1 WLR 795).

> The categories of procedural fairness are not closed and the procedure adopted in a particular case may be fair or otherwise according to its own facts. The measure of fairness afforded to a particular plaintiff is a question of fact and of degree that is to be judged according to our own standards and values and not according to the standards and values of a foreign Judge, however eminent. That is to say that we cannot obtain valuable assistance from other sources: but in the final analysis it is a question that is to be decided according to the Malaysian concept of fairness.
>
> On the facts of the present case there was, in my opinion, no departure from procedural fairness by the defendants' failure to affford the plaintiff the oral hearing he had asked for. The charges were well drafted and care was taken to ensure that full particulars were provided. A reasonable man similarly circumstanced as the plaintiff would have had no difficulty in responding to the allegations made. Sufficient opportunity was given in the making of representations to rebut the charges, including the provision of documents requested by the plaintiff. The suggestion by Counsel that there is an added duty to provide documents without any request being made in that behalf is devoid of merit and is not supported by the well reasoned and comprehensive judgment of Edgar Joseph Jr., J (as he then was) in *Rohana v. University Sains Malaysia* [1989] 1 MLJ 487 which was cited to us and in which all the relevant authorities were collected and reviewed.
>
> I have, in the circumstances of this case, no hesitation whatsoever in concluding that the absence of an oral hearing did not occasion any prejudice to the plaintiff. I am also entirely satisfied that he did not suffer any substantial detriment in consequence of the deprivation complained of.

The rules of natural justice is basically to ensure fairness and impartiality although over a period of years there were included and expanded many other subsidiary rules to the two rules by common law. There is no doubt that these two rules play an important function not only to judicial proceedings but to administrative proceedings as well. This rule is expressed through Latin maxim which reads:

(a) *Audi alteram partem* (hear the other side); and

(b) *Audicatur el altera pars* (no man should be condemned unheard).

It is settled law that before any disciplinary action may be taken against a public servant on the ground that he has committed some misconduct which deserves punishment, he should be adequately informed of the accusations framed against him and should be given a fair or reasonable opportunity to correct or contradict those accusations against him. One of the principles of natural justice is that no one shall be condemned unheard. In *B Surinder Singh Kandan v. The Government Of The Federation Of Malaya* [1962] MLJ 169, PC Lord Denning said:

> if the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them.

This court is also mindful of the case in *Ketua Pengarah Kastam v. Ho Kwan Seng* [1977] 2 MLJ 152 at p. 154 His Highness Tuanku Azlan Shah FJ as His Highness then was (now the Sultan of Perak) in delivering the judgment of the Federal Court said:

> In my opinion, the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter whether it is labelled "judicial", "quasi-judicial", or "administrative" or whether or not the enabling statute makes provision for a hearing.

In this plaintiff's case, the complaint against the disciplinary board is that the plaintiff was not afforded an oral hearing. It is the view of this court that what is important is that whether the plaintiff was afforded a reasonable or fair opportunity of being heard so that he will be able to correct or contradict the case which was made against him and not whether the plaintiff was denied an oral hearing. In the absence of a clear express provision in reg. 27(1) for an oral hearing, this court is of the view that no question of failure to observe the principles of natural justice can arise if the plaintiff was not afforded an oral hearing as contended by Mr. Gurbachan Singh learned counsel for the plaintiff. In *R v. Gaming Board For Great Britain, ex parte Benaim And Khaida* [1970] 2 QB 417, Lord Denning MR said:

> It is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject matter.

In *Tan Hee Lock v. Commissioner For Federal Capital & Ors* [1973] 1 MLJ 238, His Lordship Gill FJ delivering the judgment of the Federal Court said:

> It is clear from the authorities that natural justice does not mean that a person performing an administrative or ministerial act must follow the procedure of a court of law or adopt procedure analogous to that of a court of law. I do not think I can accept the submission that s. 18A(2) of the Act requires the commissioner to hold any formal inquiry. What the section says is that the commissioner shall 'after making such enquiries as he thinks fit, consider such applications and make an order or refuse to make an order.' To make enquiries, to my mind, does not mean to hold a formal inquiry. The only duty of the commissioner is to see that the application confirms to the requirements of s. 18A of the Act.

Even assuming for a moment that the plaintiff is entitled to a formal oral hearing to which there is no such express provision or requirement, this court is of the view from the given facts that there is no violation to the principles of natural justice. As has been already stated, the plaintiff was informed of the charges against him and he was given an opportunity to exculpate himself and he responded accordingly.

This court is also mindful that in *Munusamy v. Public Services Commission* [1967] 1 MLJ 199, Lord Hodson in delivering the decision of the Privy Council said:

> Held: (1) article 135(2) of the Constitution was concerned with the right to be heard in respect of disciplinary offences and applied only when dismissal or reduction in rank was inflicted in circumstances involving the imposition of a punishment or penalty. Penal consequences or punishment existed if an order for the reduction of rank of a member of a public service entailed or provided for forfeiture of pay or allowances, loss of seniority in substantive rank, or the stoppage or postponement of his future chances of promotion. In this case there has been no reduction of rank enabling the appellant to rely on the provisions of article 135(2) and so obtain a hearing for the reason that the action of the respondent could not be characterised as being by way of punishment.

In *Ganasan a/l Marimuthu v. Public Services Commission & Anor* [1998] 4 CLJ 331 at 342, His Lordship NH Chan JCA said:

> The Privy Council as well as the Supreme Court have held that in employing the procedure prescribed in general order 26 and the former reg 30 of the general orders, the requirements of fairness have been satisfied by an opportunity to make written representations to the deciding body. In all such cases, it has been held time and again by the highest courts in the land that written representations will suffice and that a fair hearing does not mean that there must be an opportunity to be heard orally by the officer in person or by his lawyer at the disciplinary authority stage. It is only at the committee of inquiry stage that an oral hearing, and with it the desirability or otherwise of legal representation, can be considered.

This court therefore finds that the disciplinary board has not breached or contravened the demands of fairness as provided in the reg. 27(1). Therefore, there is no procedural impropriety or unfairness on the facts in this case.

Whether Plaintiff Entitled To Second Opportunity To Be Heard In Mitigation Before Sentence Was Imposed

As to the complaint that the plaintiff was not given a second opportunity to be heard in mitigation before the sentence was imposed, this court is of the view that there was infact procedural unfairness although there was no such requirement under reg. 27 to have a separate exercise. Firstly, the

letter dated 8 April 1996 exh. HI 1 did not precisely state the intended punishment if the plaintiff was found guilty other than stating in general that he could be punished under reg. 38 if he was found guilty. Secondly, since the letter dated 8 April 1996 exh. HI 1 had expressly stated that the intended disciplinary action was contemplated not with a view of dismissal or reduction in rank of the plaintiff but punishment under reg. 38 of Regulations 1993 which provides several and different types of punishment, the plaintiff ought to have been at least informed in the plainest term which type of punishment as contained in reg. 38 was intended to be imposed. Regulation 38 contains the following punishments:

(a) warning;

(b) fine;

(c) forfeiture of emoluments;

(d) deferment of salary movements;

(e) reduction of salary;

(f) reduction in rank; or

(g) dismissal.

Consequently, the plaintiff was denied the opportunity to put forward his mitigating plea before the disciplinary board decided to mete out the punishment. This court is of the view that merely informing the plaintiff that he could be punished under reg. 38 if he was found guilty of the charges is not sufficient.

In this respect, this court is in full agreement with the decision of His Lordship Vincent J in *Utra Badi a/l K Perumal v. Lembaga Tatatertib Perkhidmatan Awam & Anor* [1998] 2 CLJ 306, His Lordship Vincent J held that:

> It would be unjust to deny the civil servant an opportunity to be heard in mitigation before punishment is imposed on him, as the punishment itself involves a further decision-making process.
>
> The right of the plaintiff to be heard in mitigation is implicitly encompassed in general order 23 of the General Orders and in art 135(2) of the Federal Constitution. Consequently, as it is common ground that the first defendant had not given the plaintiff any opportunity to be heard in mitigation before punishment, the decision making process pertaining thereto is fatally flawed.

It is important at this stage to remind this court with the second paragraph of exh. HI 1 which states as follows:

> 2. Lembaga Tatatertib setelah menimbangkan segala maklumat yang diterima, berpendapat bahawa tuan patut **dikenakan tindakan tatatertib bukan dengan tujuan buang kerja atau turun pangkat di bawah peraturan 27**, Peraturan-Peraturan Awam (Kelakuan dan Tatatertib) 1993 atas pertuduhan-pertuduhan berikut:

In the circumstances and taking into account that reg. 38 contains five other types of punishments apart from reduction in rank or dismissal, this court is of the view that it will be unjust to deny the plaintiff an opportunity to be heard in mitigation before the punishment was imposed on him. It cannot be denied that the punishment itself involves a further decision making process as stated in the letter exh. HI 1 and read with reg. 27(2) and that the sentence will only be imposed where the disciplinary board finds the plaintiff guilty. Incidentally and as this court was in the midst of writing this judgment, it became so timely for the plaintiff's case that the Court of Appeal upheld the decision in *Utra Badi* [2000] 3 CLJ 224, His Lordship Gopal Sri Ram JCA in delivering the judgment of the Court of Appeal and analysing the right to procedural unfairness said there are two separate and distinct steps in the public service disciplinary process *"the first step is for the disciplinary authority to decide upon the issue of guilt or innocence. If the decision is in favour of the employee, that is the end of the matter but if the relevant authority finds the public servant guilty, then, and then only, does the question of punishment arise"* and this court is obliged to follow that decision of the Court of Appeal in accordance with binding precedent.

In *Inspector-General Of Police & Anor v. Alan Noor bin Kamat* [1988] 1 MLJ 260, the disciplinary authority did not state at all in the show cause letter to the respondent the proposed punishment or that the disciplinary proceedings were initiated with a view to dismiss or reduce the rank of the respondent. In the circumstances, the facts in *Alan Noor*'s case has to be distinguished and may not directly be relevant in considering the facts in the plaintiff's case before this court wherein the disciplinary proceedings in the plaintiff's case was carried out pursuant to reg. 27(1) of Regulations 1993 which provisions are not similar to the provisions in reg. 28(1) which was applied in *Alan Noor*'s case and which merits a punishment of dismissal or reduction in rank.

However, in agreeing with the contention of the plaintiff's counsel based on the facts in the plaintiff's case that he ought to have been afforded a second opportunity to mitigate before the disciplinary board decided to impose the punishment, this court wishes to distinguish in that, in *Tan Tek*

Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771, His Lordship Gopal Sri Ram JCA by a majority decision said that the disciplinary authority need not afford the public servant an opportunity to make representation upon the issue of punishment in a case to which proviso (a) of art 135(2) of the Federal Constitution applies. By implication it would mean that apart from cases which involves the application of proviso (a) of art 135(2) of the Federal Constitution, this court is of the view that the right to be heard or to make representation upon the issue of punishment is not lost to the plaintiff because exh. HI 1 did not disclose the precise type of punishment that the disciplinary board had intended to impose under reg. 38. Having noted *Tan Tek Seng*'s case, it is important to mention at this stage as pointed out by the learned Federal counsel that the majority decision in *Tan Tek Seng*'s case appears to have been overruled by the Federal Court in *Ng Hock Cheng v. Pengarah Am Penjara & Ors* [1998] 1 CLJ 405, wherein His Lordship Peh Swee Chin FCJ when delivering the judgment of the Federal Court said:

> the majority judgment in *Tan Tek Seng* cannot stand though we express our agreement with the minority judgment on the same narrow point.

As for the decision in *Samsuddin Mohd Saad v. Pengarah Hospital Bahagia, Ulu Kinta & Anor* [1999] 1 CLJ 138, which is pending appeal to the Court of Appeal *vide* Civil Appeal No: A01-76-98 and which declined to follow the High Court decision in *Utra Badi*, this court with respect is now unable to follow the reasoning in *Samsuddin*'s case in view of the recent decision of the Court of Appeal which upheld the decision in *Utra Badi.* Also, the facts in *Samsuddin*'s case has to be distinguished wherein in the show cause letter to the plaintiff, the disciplinary authority had mentioned that the disciplinary proceeding was initiated with a view to dismissal under the then Public Officers (Conduct And Discipline) (Chapter D) General Orders 1980. In that case, the plaintiff had attended an inquiry conducted by the disciplinary board which was conducted after the plaintiff was afforded an opportunity to make representation in writing which the plaintiff did by a letter dated 1 August 1988. It is also important to mention that the Court of Appeal in *Utra Badi* said that Ajaib Singh J's remark at first instance and the Supreme Courts comments upon it at the appeal in *Alan Noor*'s case which His Lordship Dato' Kang Hwee Gee J had relied on in *Samsuddin*'s case are both merely *obiter dicta* which was also said by His Lordship Vincent Ng J in *Utra Badi.* In view of the recent decision of the Court of Appeal in *Utra Badi*, it is the view of this court that although the decision making process by the disciplinary board is not a trial like in a court room or in a court of law, it must surely involve a further decision making process as to the type of punishment to be imposed against the plaintiff ie, after the plaintiff is found guilty and

not otherwise. In *Delhi Transport Corp v. DTC Mazdor Congress & Ors* [1991] Supp 1 SCC 600 at p. 717, Satwant J when delivering the majority decision of the Supreme Court said:

> The right to life includes right to livelihood. The right to livelihood therefore cannot hang on to the fancies of individuals in authority. The employment is not a bounty from them nor can its survival be at their mercy. **Income is the foundation of many fundamental rights and when work is the sole source of income**, the right to work becomes as much fundamental. Fundamental rights can ill afford to be consigned to the limbo of undefined premises and uncertain applications. That will be a mockery of them.

In the circumstances and based on the facts as contained in exh. HI 1 and bearing in mind that the punishment against the plaintiff for the 1st and 2nd charges was deferment of salary movement which involves the income of the plaintiff and his reputation as well among his colleagues, it cannot be said that the plaintiff was not prejudiced as exh. HI 1 did not expressly make it clear the type of punishment, the 1st defendant, the disciplinary board had contemplated under reg. 38 if he was found guilty of the charges. Consequently, this court finds there is flaw which has resulted in procedural unfairness to the plaintiff and on this ground alone, the punishment cannot be sustained.

Whether Punishment Could Be Imposed On The Plaintiff Before He Is Found Guilty Of The Charges

Be that as it may, it is regretful to note with respect, that both parties did not address or bring to the attention of this court the most important and glaring failure on the part of the disciplinary board to make a finding of guilt against the plaintiff which both parties seem to have overlooked and which was an important decisive consideration to this originating summons and which has resulted in procedural irregularity. This court is not unmindful that the Malaysian judicial system follows the common law adversarial system of procedure as distinct from the inquisitorial system applied in civil law jurisdiction. Nevertheless, this court which sits as justice of common law cannot be seen to be wearing blinkers to disregard such a fundamental breach in the procedural fairness and that any miscarriage of justice must be rectified. The learned Federal counsel in reply to the complaint of the plaintiff was repeatedly stressing that the disciplinary board had complied with all procedures in reg. 27(1) of Regulations 1993 and that by complying with reg. 27, the disciplinary board has complied with the decision making process without she noticing that nowhere in the letter dated 14 June 1996 exh. SY3 has the disciplinary authority informed the plaintiff **whether he has been found guilty** of the

charges framed against him. Regulation 27 sub(2) of Regulations 1993 expressly states as follows:

> (2) Where, after considering the representation made under subregulation (1), the appropriate Discipline Authority **finds**:
>
> (a) **the officer guilty**, it shall impose on the officer any one or more of the punishments specified in regulation 38 as it deems fit and proper; or
>
> (b) **the officer not guilty**, it shall acquit him.

Whereas the procedure in reg. 28 does not require the disciplinary board to make a finding of guilt as is required under reg. 27. For the purpose of clarity, it is important to include the provision of reg. 28 to distinguish the provision in reg. 27. Regulation 28 reads as follows:

> (1) The appropriate Disciplinary Authority sitting to consider a case where the breach of discipline complained of has been found to be of a nature which merits a punishment of dismissal or reduction in rank shall consider all the available information and where it appears that there is a *prima facie* case against the officer for dismissal or reduction in rank, the appropriate Disciplinary Authority shall direct that a statement containing the facts of the breach of discipline alleged to have been committed by the officer and any proposed ground on which the officer is to be dismissed or reduced in rank be sent to the officer and shall call upon him to make a written representation, containing grounds upon which he relies to exculpate himself, within a period of not less than twenty-one days from the date of receipt of the charge.
>
> (2) Where, after considering the representation made pursuant to subregulation (1), the appropriate Disciplinary Authority is of the opinion that the breach of discipline or misconduct by the officer does not merit the punishment of dismissal or reduction in rank, the appropriate Disciplinary Authority may impose on the officer any lesser punishment as it deems fit and proper.

It is also regretful to note that during the submission by both the learned counsel for the plaintiff and the Federal counsel for the respondents on the issue of whether the issue of mitigation or a second opportunity was given to the plaintiff was being addressed, both parties continued their submission on the assumption that the plaintiff was infact found guilty before the sentence was imposed, when infact there was no such finding of guilt by the disciplinary board as can be seen from the letter dated 14 June 1996 exh. SY3. This court finds that exh. SY3 merely states that on considering in detail the charges against the plaintiff and the reply given by the plaintiff, the 1st defendant, the disciplinary board has decided to

impose the punishment. It is important to state once again the relevant passage of the letter dated 8 April 1996 exh. HI 1 from the disciplinary board to the plaintiff just immediately after the charges which expressly states that **if the plaintiff is found guilty** on the charge, he could be sentenced in accordance with reg. 38. The relevant passage in exh. HI 1 reads as follows:

> 2.1 **Pertuduhan Pertama:**
>
> **Jika tuan didapati bersalah** ke atas pertuduhan pertama, tuan boleh dihukum mengikut Peraturan 38, Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993.
>
> 2.2 **Pertuduhan Kedua:**
>
> **Jika tuan didapati bersalah** ke atas pertuduhan kedua, tuan boleh dihukum mengikut Peraturan 38, Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993.

As a result of the failure by the disciplinary board **to make a finding of guilt** against the plaintiff, the question that may arise is whether there was excess of jurisdiction, in other words, the legal authority or the power of the disciplinary board when it decided to impose the punishment on the plaintiff. Can the disciplinary board mete out the punishment against the plaintiff without first finding the plaintiff guilty of the charges framed against him? Regulation 27(2) expressly requires the disciplinary board **to make a finding on the guilt** of the plaintiff as only upon finding the plaintiff guilty, it shall then proceed to impose against the plaintiff any one or more of the punishment provided in reg. 38 and if an officer is found not guilty, it shall acquit him. This court finds that reg. 27(2) is crystal clear that in order to impose the punishment as stipulated under the regulation, the plaintiff must first be found guilty. As the finding of guilt against the plaintiff was nowhere stated either in the letter dated 14 June 1996 – exh. SY3 or even in any of the affidavits affirmed on behalf of the respondent and relied on by the learned Federal counsel, this court finds that this is a clear case of serious procedural unfairness or breach of procedural fairness and exceeds jurisdiction, which calls for intervention by this court in the decision or the process leading to it.

Infact it behoves the disciplinary board not to act mechanically but to follow the mandatory procedures stipulated under reg. 27. In cases relating to deprivation of property or a person's livelihood or reputation, as in the case of the plaintiff, the law that is to be applied must be strictly construed and followed and in cases of any doubt the court should lean in favour of the aggrieved person, in this case, the plaintiff. The words in reg. 27 cannot be treated as dead letters and must be given purposive interpretation. In

Local Government Board v. Arlidge [1915] AC 120 at p. 138 Lord Shaw of Dunfermline said:

> … if a statute prescribes the means it (ie, the deciding body) must employ them.

Accordingly, the disciplinary board must comply with the statutory requirements and the decision may be quashed if there is no such compliance.

In this case where the punishment imposed by the disciplinary board cannot be held to be in accordance with express procedure established by the law, this court must intervene with a view to quash the decision.

It cannot be said that failure to strictly follow the provisions of reg. 27 or the absence of finding the plaintiff guilty of the charges by the disciplinary board as a mere fetish of those express provisions and therefore does not justify interference by this review court. Infact the disciplinary board must make a finding of guilt against the plaintiff which is a pre-requisite to punishment. By including the following words immediately after each charge in exh. HI 1, the disciplinary board must have deemed it necessary to find the plaintiff guilty of the charges before imposing the punishment.

> **Jika tuan didapati bersalah** ke atas pertuduhan pertama, **tuan boleh dihukum mengikut Peraturan 38**, Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993.

In *Re R Sambasivam* [1969] 1 MLJ 219 at 220, His Highness Tuanku Azlan Shah J as His Highness then was (now the Sultan of Perak) said:

> I agree that procedural provisions relating to disciplinary proceedings are to be treated as mandatory and therefore must be strictly construed.

In *Utra Badi*'s case His Lordship Gopal Sri Ram JCA said:

> There are two separate and distinct steps in the public services disciplinary process, the first step is for the disciplinary authority to decide upon the issue of guilt or innocence. If the decision is in favour of the employee, that is the end of the matter. But if the relevant authorities finds the public servant guilty, then, and then only does the question of punishment arise.

In *Utra Badi*, Her Ladyship Siti Norma Yaakob JCA said:

> clearly there are two stages in proceedings before the 1st appellant (Lembaga Tatatertib). The first was the determination as to whether the alleged misconduct had been made out after considering all the facts of the allegation and the grounds of which the respondent relied to exculpate

himself. Once the misconduct has been established, the second stage was to determine the appropriate punishment to commensurate with the misconduct committed by the respondent.

In *Halimatussaadiah v. Public Service Commission, Malaysia & Anor* [1992] 1 CLJ 413, His Lordship Eusoff Chin J as His Lordship then was now the Chief Justice of Malaysia in dismissing the plaintiff's claim for a declaration that her purported dismissal from service is null and void, inoperative and of no consequence held that Order 26(4) of the Public Officers (Conduct And Discipline) (Chapter D) General Orders 1980 does not require the Public Service Commission to make a finding of guilt before dismissing the plaintiff and that the commission was only required to decide if the plaintiff's explanation had exculpated her to the satisfaction of the commission. Following an appeal by the plaintiff, the Supreme Court [1994] 3 MLJ 61 confirmed the decision of the High Court.

However, the decision in *Halimatussaadiah*'s case can be distinguished from the plaintiff's present case. In *Halimatussaadiah*'s case, the relevant provisions of O. 26(4) did not provide any express provision to make a finding of guilt. Order 26(4) reads as follows:

> (4) If the officer does not furnish any representation within the specified time, or if he furnishes a representation which fails to exculpate himself to the satisfaction of the Appropriate Disciplinary Authority, **it shall then proceed to consider and decide** on the dismissal or reduction in rank of the officer.

Whereas in the present case, reg. 27(2) of Regulations 1993 reads as follows:

> **(2) Where, after considering the representation made under subregulation (1), the appropriate Disciplinary Authority finds –**
>
> (a) **the officer guilty, it shall impose on the officer any one or more of the punishments specified in regulation 38** as it deems fit and proper; or
>
> (b) The officer not guilty, it shall acquit him.

It would appear from the wordings of reg. 27(2), there must be an express finding of guilt and that finding of guilt is a pre-requisite and or a necessary condition before any punishment can be imposed but O. 26(4) of Bab D 1980 does not provide for any such requirement. Therefore, to this extent the facts in *Halimatussaadiah*'s case can be distinguished with the facts relating to the present case and by implication and taking into account the letter dated 14 June 1996 exh. SY3 to be read together with

regulation sub(2) of reg. 27, the disciplinary board must first make a finding of guilt against the plaintiff before proceeding to the second stage to impose the punishment.

Therefore, this court finds that it is imperative for the disciplinary board to make an express finding of the guilt before any form of punishment can be meted out to the plaintiff. Accordingly, there was procedural unfairness on the facts in this case which is sufficient to quash the decision of the disciplinary board.

In the circumstances, this court finds that there is an incurable flaw in the exercise of the power of the disciplinary board to impose the punishment against the plaintiff in respect of the first and second charges and therefore the decision cannot be sustained.

Whether The Disciplinary Board Must Give Reasons For Decision

As to whether the disciplinary board must give reasons for its decision, this court does not wish to deal with that aspect of the law as it is unnecessary in view of the decision by this court that there has been procedural unfairness meted out to the plaintiff as advanced hereinbefore which has resulted in the decision arrived by the disciplinary board as void and of no effect. In this respect this court is not unmindful of the decision in *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan And Another Appeal* [1997] 1 CLJ 665 (see (1) *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65 FC, (2) *Doody v. Secretary Of State For The Home Department And Other Appeals* [1993] 3 All ER 92 and (3) *Martha Stefan v. General Medical Council* [1999] 1 WLR 1293).

Whether Court Must Examine Correctness Of Decision On Merits Of The Disciplinary Board

In view of the stand taken by this court on the issue of procedural unfairness in favour of the plaintiff, this court does not wish to consider the merits of the plaintiff's case as contended by the learned counsel for the plaintiff. On this area of the law see *Majlis Perbandaran Seberang Perai v. Tropiland Sdn Bhd* [1996] 3 MLJ 94 which referred to the majority decision of the Federal Court in *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147 and which was followed by the Court of Appeal in *Amanah Butler (M) Sdn Bhd v. Yike Chee Wah* [1997] 2 CLJ 79.

In the circumstances and for the reasons advanced in this judgment, the plaintiff's amended originating summons is allowed. Accordingly, judgment is entered in terms of the declaration sought by the plaintiff in lamp. 37 prayer (a), (b), (c), (e) and (f). The punishment imposed on the plaintiff is null and void and is of no effect and both the parties are to determine the plaintiff's entitlement to his salary and other emoluments as prayed in para (d) failing which the deputy registrar of this court is to hold an inquiry to decide on the issue of salary adjustments. The defendants are ordered to pay the costs of the originating summons.